Petition

81-1093

Office Supreme Court, U.S.
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NO. _____

THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOSEPH RAYMOND GOMEZ,

PETITIONER

VERSUS

PEOPLE OF THE STATE OF COLORADO,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF COLORADO

EUGENE DEIKMAN
Counsel for Petitioner
702 United Bank Center
Denver, Colorado 80290
(303) 861-4310

CRAIG A. MURDOCK
Attorney for Petitioner
110 16th St., #1410
Denver, CO 80202
(303) 892-9800

QUESTION PRESENTED FOR REVIEW

WHERE THE PETITIONER IS UNDER ARREST AFTER A WARRANTLESS ENTRY OF HIS MOTEL ROOM, AND THE PREMISES ARE SECURED BY THE POLICE, AND WHERE THERE IS NO SHOWING THAT THE EVIDENCE WITHIN THE ROOM IS IN ANY DANGER OF DESTRUCTION OR LOSS, MAY THE POLICE, WITHIN THE AMBIT OF CHIMEL V. CALIFORNIA, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, (1969) GET DOWN ON THEIR HANDS AND KNEES TO LIFT WITH TAPE SUSPECTED HEROIN DEBRIS FROM THE SHAG CARPET OF AN ADJACENT ROOM, WITHOUT FIRST OBTAINING A SEARCH WARRANT?

Petitioner says no.

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Where the Petitioner is Under Arrest after a Warrantless entry of his motel room, and the premises are secured by the police, and where there is no showing that the evidence within the room is in any danger of destruction or loss, may the police, within the ambit of Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, (1969), get down on their hands and knees to lift with tape suspected heroin debris from the shag carpet of an adjacent room, without first obtaining a search warrant? . . . 14

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. _____

_____

_____

JOSEPH RAYMOND GOMEZ,

PETITIONER,

- vs -

DISTRICT COURT, COUNTY OF JEFFERSON, STATE OF COLORADO,

RESPONDENT.

_____

_____

PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT,
COUNTY OF JEFFERSON, STATE OF COLORADO

The Petitioner, Joseph Raymond Gomez, prays that a Writ of Certiorari issue to review the opinion and judgment of the District Court of the State of Colorado, Jefferson County, rendered in these proceedings March 4, 1980.

OPINION BELOW

The Supreme Court of the State of Colorado entered its opinion affirming the conviction of Petitioner August 10, 1981. A copy of the opinion, which has not yet been reported, is attached as Appendix A. A copy of the order denying the Petition for Rehearing is attached as Appendix B.

JURISDICTION

On August 10, 1981 the Supreme Court of the State of Colorado entered judgment affirming the convictions of Petitioner in the District Court of the County of Jefferson, Honorable Daniel P. Shannon, presiding.

The jurisdiction of this Court is invoked under Title 28, USCA 1257; and Rule 19 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment:

" The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, and supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The information (Ff 12-13) charges that Petitioner on November 11, 1977, possessed for sale a narcotic drug, heroin, with the specific intent to induce or aid another person to unlawfully use or possess heroin in violation of 12-22-322 (1) (a), CRS 1973 (1978 Repl. Vol. 5). The charge arose out of the Petitioner's arrest in the early morning hours of November 11, 1977, at the Sunset Village Motel, Lakewood, Colorado. After a trial by jury, the Petitioner was convicted of the above offense March 4, 1980 (Ff. 102-105).

Prior to the trial, Petitioners two motions to suppress were heard. The motion to suppress on the grounds of illegal search

and seizure (Ff 35-39) was denied June 19, 1978 (F 194). The motion to suppress on the grounds of prosecutorial destruction of evidence (Ff 72-75) was granted in part. The People took an interlocutory appeal from this order, and the Supreme Court affirmed the trial court on June 25, 1979, in People v. Gomez, ___ Colo. ___, 496 P.2d 1192 (1979). The transcript of the hearing on the motion to suppress on the grounds of illegal search and seizure is separate from the transcript of the trial. The folio numbers of the suppression hearing will be designated: "(SF)"

The live-in manager of the Sunset Village Motel (SFf 161-162), which motel had been victimized by a series of thefts of television sets, bedspreads, blankets and pillows, contacted the Lakewood Police, telling Officer Fischer (SF 165) that her suspicions were focused on a group of four individuals who were at the premises each

evening that the above items were reported missing. (SFf 10; 146; 165-168). She gave the police the register cards of the suspected individuals, and was told that one party, Oliquin, was wanted on drug charges (SFf 165-166). The officers told the manager of their suspicions concerning drug transactions in the motel, and asked her to call them should any of these people return. They further told her that Oliquin and his nephew Herrera were the main suspects (SFf 168-170). Herrera had rented the room several times for Oliquin (SF 172).

On November 11, 1977, the manager notified the police that Herrera was at the motel (SFf 170-171). Her testimony was that the officers went immediately to the motel room, Unit 17 (SF 175). She observed the officers staking out the unit, in three marked and unmarked police cars, beginning

their surveillance about 10:00 that night (SFf 180; 211).

Agent Shilaos testified that the manager called at about 11:00 p.m. saying Herrera had registered in Room 17. Shilaos, a plain-clothes officer, contacted Agent Shaw, a uniformed officer, and they both proceeded in separate cars to the motel, to question Herrera in connection with the thefts (SF 13). Shaw drove a marked Lakewood Police vehicle and Shilaos an unmarked one (SF 14).

There were two automobiles in front of the motel room (SF 18). Shaw parked his patrol car east of Room 17, facing Shilaos' unmarked vehicle parked west of the unit (SF 18). When Shilaos got out of his car, he observed a man later identified as Herrera looking straight at him through the curtain window of the motel room door (SF 21-22). As Shilaos walked toward the door, he approached the corner of the motel room,

which had windows coming together at the corner on the west and north side. These windows were curtained, but there was a one-inch to one-and-a-half inch gap where the curtains met (SF 24). Through this gap, he observed a man later identified as the Petitioner seated at a make-up table in front of a mirror, with his back to Shilaos. The man was moving a pile of brownish granular material toward a pile of white powder with a straw (SFf 24-27; 37). Shilaos thought he was observing the "cutting" of heroin (SF 31). His observation "was only a matter of seconds, if that long" (SF 37) and he kept walking past the window, until it registered in his mind what had happened (SFf 85-90).

Agent Shaw was now at the front door of the motel, and Shilaos yelled to him: "Hold the front door. They are cutting heroin." (SF 39). Shilaos returned to his patrol car and notified the dispatcher

to send more cars (SF 46). He then ran directly to the door, identified himself as a Lakewood police officer, and demanded entry. Herrera held the door shut, and against resistance, Shilaos pushed it open (SFf 47-52). Once inside the unit, the officers heard a toilet flushing and observed the Petitioner Gomez come out of the bathroom. The Petitioner asked the officers: "Do you have a warrant?" (SFf 60-63). Shiloas pushed him out of the way and ran past Gomez into the bathroom where he observed a clear plastic bag containing a brownish substance go down the toilet. The officer returned to the hallway where Gomez and Herrera were standing and observed the entire motel room where other items, subsequently seized, were located. The two occupants were immediately arrested, handcuffed, and searched, and then removed from the scene and transported to the police station. Sometime later the officers who

had been joined by back-up agents conducted a warrantless search and seizure of the entire motel unit and seized materials from various locations in the unit. This search began about ten minutes after the Petitioner and Herrera were removed from the scene and after the room and all the contents therein were secured. Agent Shilaos, in corroboration with another agent, seized all the items "that were foreign to the motel room that were out in plain view" and went through drawers, the closet, and a bench (SFf 135-136).

Photographs and diagrams admitted at the suppression hearing showed that the motel unit consisted of three rooms, a bedroom to the left of the entry door, a small hallway leading to the bathroom and shower in the right rear, and a small room with make-up table and mirror directly to the right of the entry door. Among the things seized around the make-up table and mirror (SF 10) was People's Exhibit 10

(referred to as Exhibit 3 in the Pre-Trial Hearings). The warrantless search and seizure of the evidence constituting People's Exhibit 10 is at the heart of this Petition.

Shilaos testified that People's Exhibit 10 was a pill box containing adhesive tape with debris thereon, and it also contained loose granular material (Ff 487-489). This evidence had been recovered from the shag carpet beneath the make-up table. Approximately ten minutes after the suspects had been arrested, handcuffed, sentenced and removed from the premises, Agent Shilaos, in corroboration with Agent Gaouette, got down on his hands and knees, and by closely scrutinizing the shag carpet of the room adjoinging the hallway in which the suspects had been arrested, the agents were able to recover 7/10,000 of an ounce of heroin debris (equivalent to a 160th thousandth portion of one gram.). The agents

recovered this evidence by first picking up what they could with their fingers and placing it in the pill box, and then by using adhesive tape to lift additional debris from the carpet. Shilaos observed Gaouette seal the tape and debris in the box (F 485). The box was placed in a sack, which was sealed by Gaouette, and the sack was placed in a locker in the property room of the police department (F 488). The contents of the box were opened by Shilaos at the trial, and they appeared in the same condition as he observed at the time of the seizure (F. 489).

The District Court, in Jefferson County, State of Colorado, denied the Petitioner's pre-trial motion to suppress the evidence recovered from the motel room, including the 7/10,000 of an ounce of heroin debris marked People's Exhibit 10 (F 194). The District Court concluded that Agent Shilaos' initial observations of Petitioner in the

unit were lawful and established probable cause and exigent circumstances to enter the premises, arrest Gomez and seize the evidence within, including the heroin debris. From this determination Petitioner has appealed, and has now exhausted all state remedies, and has received final judgment from the Supreme Court of the State of Colorado. Furthermore, Petitioner has received Notice of Denial, August 31, 1981, of his Petition for Rehearing to the Supreme Court, State of Colorado. Therefore, within the time allowed by statute, Petitioner now files his Petition for Writ of Certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

Where the Petitioner is under arrest after a warrantless entry of his motel room, and the premises are secured by the police, and where there is no showing that the evidence within the room is in any danger

of destruction or loss, may the police, within the ambit of Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, (1969), get down on their hands and knees to lift with a piece of scotch tape suspected heroin debris from the shag carpet of an adjacent room, without first obtaining a search warrant?

Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) holds that a search incident to arrest is reasonable only if limited: (1) to the arrestee's person, or (2) to areas within his immediate control. Once Petitioner Gomez was completely secured, (arrested, handcuffed, and searched) rendering him incapable of destroying evidence, did Chimel, supra, mandate that the police obtain a warrant to further search and seize additonal evidence in adjacent rooms not within plain view?

Police are permitted, under Chimel v. California, supra, to search no futher than an area into which the Defendant might reach to grab a weapon or destroy evidence. If the police desire to search any other area at the time of arrest of thereafter, they must obtain a search warrant. It is uncontroverted that Gomez was secured, handcuffed and under police control within seconds after police entry into his room. Consequently, from this stage of the arrest onwards, the ambit of a proper police search and seizure under Chimel, i.e.: the area within the Defendant's immediate control, and/or the area from which he might gain possession of destructible evidence, was limited to no more than his outer garmets of clothing, and perhaps the carpet immediately under his feet. Not only was Petitioner Gomez under such complete control within seconds of the police penetration into his motel room, as to render any

attempted destruction of evidence within the adjacent room impossible, but Gomez was not even aware of the minute traces of debris mixed into the carpet fibers in the next room, much less able to fall to his hands and knees in his secured status to attempt to destroy the 7/10,000 of an ounce of debris in the adjoining room.

Justice Quinn, delivering the opinion of the Colorado Supreme Court, attached hereto as Appendix A, paints a broad brush through this entire issue by claiming the search and seizure was justified to prevent the destruction of evidence:

> "The small particles taken from the floor under and around the make-up table and from other areas in the unit could readily have been destroyed or lost if they were not seized on the spot." (Appenix A, Page 13)

But Justice Quinn offers no discussion of how the evidence was to be destroyed, whether by the suspects, the agents themselves, chemical transmogrification or transforma-

tion, evaporation, or other possibilities unseen. No evidence appeared in the record of the District Court proceedings, remotely suggesting these possibilities.

Since no one was allowed access to the room secured by the Lakewood police, once Unit 17 had been entered, there is no basis for belief that the trace amounts of heroin debris the officers accumulated as the fruits of their search through the carpet fibers with scotch tape was in danger of going anyplace while the officers waited for a proper warrant to issue. The evidence seized was in granular, not liquid form, and absent chemical or climactic upheavals unknown, the 7/10,000 of an ounce of debris, though miniscule, would have been entirely as accesible to a police search after the issuance of a valid warrant, as before.

"Incident to arrest" seizures must have both a temporal and spatial proximity to

the arrest. U.S. v. Edwards, 474 F.2d 1206 (6th Cir. 1973); Trupiano v. U.S., 334 U.S. 600, (3rd Cir. 1949); Preston v. U.S., 376 U.S. 363 (1964); Stone v. California, 375 U.S., 483 (1964). In the instant case, none of the evidence seized had spatial proximity to the arrestees. The items on the make-up table were far from the immediate control of the arrestees at the time the officers entered. Likewise, there was no temporal proximity. Seizures were made some ten to twenty minutes after the arrestees had been removed from the premises. A search cannot be incident to an arrest after the administrative process and mechanics of the arrest have come to a halt and the prisoner is in jail.

It is well to recall the justification for the "search incident to arrest" exception to the search warrant requirement. As stated in Preston v. U.S. 376 U.S. 364, 677, (1964), and reiterated in Chimel v. California, supra:

> "The rule allowing contemporaneous searches is justified for example for the need to seize weapons and other things that might be used to assault an officer or effect an escape as well as by the need to prevent the destruction of the evidence of the crime-- things that might easily happen when a weapon or evidence is on the accused person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. U.S. v. Edwards, 472 F.2d 1206 (6th Cir. 1973)."

Finally, under the decision in Coolidge v. New Hampshire, 403 U.S. 443 (1971), Judge Stewart discussed three basic standards which must be met in order for seizure to be judged permissable under the "plain view doctrine;" (1) a valid intrusion into a protected area, (2) inadvertent discovery, (3) immediate recognition that what has been discovered is evidence of wrongdoing. Under the facts of the instant case, analysis need not proceed further than category (2), above. The 7/10,000 of an ounce of heroin debris hidden in the shag carpet fibers was patently not

in plain view of either the suspects secured in the adjoining hallway, or the police officers themselves. This trace evidence was accumulated during a ten minute search with scotch tape only after the most meticulous on-hand-and-knee inspection of the carpet under or near the make-up table.

CONCLUSION

Based on the above issues herein presented for review, the Petitioner respectfully prays that a Writ of Certiorari shall issue from the Supreme Court of the United States to review the judgment rendered May 4, 1980, by the District Court of the County of Jefferson, State of Colorado.

Respectfully submitted,

Eugene Deikman, P.C.,
#3608
702 United Bank Ctr.
Denver, Colo. 80290
(303) 861-4310

Dated: 30 October 1981.

AFFIDAVIT OF SERVICE

Personally appeared before me, the undersigned authority in and for the City and County of Denver, State of Colorado, the within named Eugene Deikman, who after being by me first duly sworn stated on oath that he had mailed, postage prepaid, by U.S. Mail, a true and correct copy of the above and foregoing Petition to Counsel for the Respondent, Honorable J. D. MacFarlane, Office of the Attorney General, State of Colorado, 1525 Sherman Street, 3rd floor, Denver, Colorado, 80203, Attn: Susan P. Mele, on the 1st day of December, 1981.

Eugene Deikman

STATE OF COLORADO)
) ss.
County of Denver)

SUBSCRIBED AND SWORN TO before me this 1st day of December, 1981.

Susan Roe
Notary Public
702 United Bank Ctr.
Denver, CO 80290

My commission expires:
April 1, 1985

Appendix

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NO. _____

THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOSEPH RAYMOND GOMEZ,

PETITIONER

VERSUS

PEOPLE OF THE STATE OF COLORADO,

RESPONDENT

APPENDICES TO

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF COLORADO

EUGENE DEIKMAN
Counsel for Petitioner
702 United Bank Center
Denver, Colorado 80290
(303) 861-4310

CRAIG A. MURDOCK
Attorney for Petitione
110 16th St., #1410
Denver, CO 80202
(303) 892-9800

APPENDICES

APPENDIX A
Appeal from the District Court of the County of Jefferson, Honorable Daniel P. Shannon, Judge. August 10, 1981. (34 pages)

APPENDIX B
Order of Court Denying Petition for Rehearing. August 31, 1981 (1 page)

APPENDIX C
Motion for Stay of Mandate From the Decision of the District Court of the County of Jefferson. September 2, 1981 (3 pages)

APPENDIX D
Petition for Rehearing. August 24, 1981. (9 pages)

APPENDIX E
Order of Court Granting Motion for Stay of Mandate, and Further Ordering that all further Stays are to be Obtained from the United States Supreme Court. September 4, 1981. (2 pages)

IN THE SUPREME COURT OF THE
STATE OF COLORADO

NO. 80SA494

THE PEOPLE OF THE STATE OF COLORADO,	)	
Plaintiff-Appellee	)	
v.	)	August 10, 1981
JOSEPH RAYMOND GOMEZ,	)	
Defendant-Appellant.	)	

Appeal from the District Court

of the

County of Jefferson

Honorable Daniel P. Shannon, Judge

EN BANC JUDGMENT AFFIRMED

J. D. MacFarlane, Attorney General
Richard F. Hennessey, Deputy Attorney General
Mary J. Mullarkey, Solicitor General
Susan P. Mele-Sernovitz, Assistant Attorney General

Denver, Colorado
Attorneys for Plaintiff-Appellee

Eugene Deikman

Denver, Colorado
Attorney for Defendant-Appellant

JUSTICE QUINN delivered the opinion of the Court.

CHIEF JUSTICE HODGES does not participate.

APPENDIX A

Joseph Raymond Gomez (defendant) appeals conviction for possession of a narcotic drug for sale in violation of section 12-22-322 (1)(a), C.R.S. 1973 (1978 Repl. Vol. 5). [1] He asserts several grounds for reversal including the trial court's refusal to suppress evidence seized in the course of a warrantless entry into his motel room, various evidentiary rulings made by the court during the trial, the court's instruction on the statutory definition of sale and its refusal to give certain tendered instructions to the jury, and the alleged insufficiency of the evidence to support his conviction. We affirm the conviction.

I. District Court Proceedings

The information charged that the defen-

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[1] This appeal was originally filed in the court of appeals but was transferred to this court pursuant to sections 13-4-102 (1)(b) and 13-4-110, C.R.S. 1973, because of the defendant's constitutional claims regarding section 12-22-301(25), C.R.S. 1973 (1978 Repl. Vol. 5), and a jury instruction based thereon.

dant on November 11, 1977, unlawfully possessed for sale a narcotic drug, heroin, with the specific intent to induce or aid another person to unlawfully use or possess the heroin. The charge arose out of the defendant's arrest in the early morning hours of November 11, 1977, at the Sunset Village Motel in Lakewood, Colorado.

During the month preceding the defendant's arrest the management of the motel had experienced a series of thefts from the motel units. The manager noticed that four persons registered at the motel on several occasions under different names and the thefts usually occurred during their stay there. Agent Shilaos of the Lakewood Department of Public Safety advised the manager to notify him if any of the four persons registered at the motel again. During the evening of November 10, 1977, the defendant's companion, Joseph Herrera, who was one of the four suspects, registered at the motel and occupied

Unit 17 with the defendant. Upon being notified of this by the manager, Agents Shilaos and Shaw went to the motel to talk to Herrera about the thefts. Shilaos was dressed in plain clothes and Shaw was in uniform.

Unit 17 is a rectangular bedroom with a shower and toilet. It is approximately twenty-four feet in length from east to west and twelve feet deep. The front door opens on the north side to a sidewalk or entrance way which extends along the entire front of the unit. There are two large casement windows in the northwest corner of the unit, both of which are located at normal eye level. One window faces north and directly overlooks the sidewalk and the other faces west and overlooks the sidewalk at a slight angle. The windows had curtains but the curtains on the window facing north had a gap or aperture of 1 1/2 to 2 inches. Approximately four feet inside the unit, directly south of the

curtain gap, was a makeup table with a five foot mirror on it.

The officers parked their vehicles near unit 17 in a common parking area. In walking from his vehicle to the sidewalk area, Shilaos noticed a person, later identified as Herrera, looking out the door window and closely watching him. On reaching the sidewalk directly adjoining the unit, Shilaos noticed a gap or break in the curtains covering the window facing north. The room inside was well illuminated. From the sidewalk area he looked through this gap and observed a man, later identified as the defendant, seated at the makeup table in front of the large mirror inside the unit. Shilaos saw the defendant moving a pile of brownish granular material toward a larger pile of white powder and concluded that he was observing the cutting of heroin with milk sugar. He told Agent Shaw of his observations and immediately radioed for

assistance.

Shilaos then ran to the front door of the unit, identified himself as a police officer, and demanded entry. Herrera held the door shut but Shilaos was able to push it open. As the officers entered the room the defendant was exiting the bathroom adjoining the bedroom and the toilet was flushing. Shilaos ran to the bathroom and saw a clear plastic bag containing the same brown granular material going down the toilet. He unsuccessfully attempted to retrieve the bag from the toilet. A brown powdery material was visible around the porcelain rim of the toilet and on some utensils in the bedroom.[2]

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[2]Brown powdery material was visible on some plastic lids, a glass jar, three 25 cent pieces and a spoon recovered from the makeup table. The trial court suppressed the brown material because it was destroyed during the prosecutorial testing for heroin, and thus the defendant's expert was prevented from testing and challenging the prosecution's evidence that the material was heroin. We affirmed the suppression ruling in People

On the makeup table in the bedroom were various implements associated with the dilution and use of heroin, including a bag of balloons, small measuring spoons, plastic lids, cotton swabs, a syringe, and an empty container of lactose.

The defendant and Herrera were placed under arrest and searched. Cash in the amount of $275 was recovered from the pants pocket of the defendant. With their hands and through the use of adhesive tape, the officers gathered up 160 milligrams of material from the area under and around the makeup table. They also seized the narcotics paraphernalia plainly visible on the makeup table. The trial court denied the defendant's pretrial motion to suppress the evi-

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2 (con't) v. Gomez, 198 Colo. 105, 596 P.2d 1192 (1979). At trial the prosecution and defense stipulated that, although the prosecution could not elicit testimony about the test results, it could offer into evidence photographs taken of the objects and elicit testimony that there was a brown powdery substance on the objects similar in appearance to the brown material observed by Agent Shilaos through the gap in the curtain.

dence recovered from the motel unit, concluding that Agent Shilaos' initial observations of the defendant in the motel room were lawful and established probable cause and exigent circumstances to enter the motel unit for the purpose of arresting the defendant and seizing the evidence therein.

During the trial Officer Shilaos described the circumstances of the defendant's arrest and the removal and preservation of the brown granules from the motel room. The granules were placed in a box and later were transmitted to the Colorado Bureau of Investigation (CBI) for chemical tests and then returned to the Lakewood Department of Public Safety. CBI Agent Netwall, whom the trial court received as an expert witness in analytical chemistry, testified that when he opened the box, there were no loose granules inside but, rather, all granules were sticking to the adhesive tape. The People offered into evidence the box and its con-

tents, People's Exhibit 10, to which the defendant objected on the ground that an unbroken chain of custody had not been sufficiently established. The court overruled the objection and admitted the exhibit.

Agent Netwall described various chemical tests performed on the residue recovered from the motel and testified that in his opinion the 160 milligrams of material contained 21.6 milligrams of heroin. On cross-examination of Agent Netwall, defense counsel elicited testimony that 21.6 milligrams of heroin were the equivalent of 0.0007 of an ounce. On redirect examination Netwall testified that this amount represented a usable quantity of heroin and that other drugs, such a codeine, were used in amounts ranging from 2 to 15 milligrams. The defendant unsuccessfully objected to Netwall's redirect testimony as beyond the qualifications of the witness and outside the scope of proper redirect examination.

During the prosecutions's case in chief the defendant unsuccessfully moved to strike the testimony of three prosecution witnesses on the grounds that they violated a sequestration order. Agent Knott, a member of the Lakewood Police Department, testified to the general method of illegal distribution and use of heroin. During a recess it was brought to the attention of the court that he had talked to Agent Shilaos about the condition in which Shilaos found the drug paraphernalia on the night of the arrest. The defendant moved for a mistrial and alternatively to strike Knott's testimony and that of Shilaos. The prosecution argued that it intended to proffer this information to Agent Knott in the course of further direct examination by asking him a hypothetical question, and, therefore, the defendant suffered no prejudice by the technical violation of the sequestration order. The trial Court denied the defendant's motion for a mistrial

but ordered that there be no further direct examination of Agent Knott. It was also brought to the attention of the trial court that a conversation between the District Attorney and Agent Netwall about the percentages of active ingredients in certain drugs had been inadvertently overheard by Agent Knott. The defendant moved to strike the testimony of both Netwall and Knott. The trial court denied the motion to strike finding that Knott's overhearing the conversation was inadvertent.

At the conclusion of the People's case the defendant moved unsuccessfully for a judgment of acquittal. Over the defendant's objection the court included in the instructions the statutory definition of "sale" as including "barter, exchange, or gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee." Section 12-22-301(25), C.R.S. 1973 (1978 Repl.

Vol. 5). The defendant tendered seven jury instructions, all of which were rejected. Two tendered instructions concerned the legal sufficientcy and significance of evidence of useless traces of narcotics. Three of the defendant's instructions related to the evidentiary significance of such matters as the recent past possession or use of narcotics, the mere presence of the defendant on premises where narcotics were found and the defendant's joint possession of the motel room with another. The defendant's other two instructions dealt with opinion testimony and the prosecution's burden to prove that the amount of heroin actually recovered was usable.

The court submitted to the jury the crimes of possession of a narcotic drug, heroin, for sale with the intent to induce or aid another to use or possess the heroin, section 12-22-322(1)(a), C.R.S. 1973 (1978 Repl. Vol. 5), and the lesser offense of pos-

session of a narcotic drug, section 12-22-302, C.R.S. 1973 (1978 Repl. Vol. 5). The jury returned a verdict of guilty to the principal charge, resulting in a sentence to a term of seven to eight years, and this appeal followed.

II. The Seizure of Evidence

We first consider the defendant's claim that the entry into the motel unit and the seizure of contraband and evidence therein constituted an unreasonable search and seizure in violation of the United States and Colorado Constitutions. U.S. Const., Amend. IV; Colo. Const., Art. II, Sec. 7. In challenging the trial court's ruling denying the motion to suppress, the defendant argues three alternative propositions: (1) Agent Shilaos' observations of the defendant through the curtains constituted a warrantless search and therefore they were invalid; (2) even if these observations were not a search, exigent circumstances did not exist

for the warrantless entry into the motel room; and (3) even if exigent circumstances did exist, the subsequent warrantless search and seizure inside the motel unit were unconstitutional. We find the defendant's arguments unpersuasive.

A.

In order for the exclusionary rule to apply, there first must be a determination that the challenged governmental conduct constitutes a search. Generally a search involves "some exploratory investigation, or an invasion and quest, a looking for or seeking out", and "implies a prying into hidden places for that which is concealed. . ." 1 W. LaFave, Search and Seizure § 2.1 at 222 (1978). Katz v. United States, 389 U.S. 374, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), provides that the starting point for determining whether the officer's initial observations of the defendant in the motel room constituted "a search" in the constitutional

sense. In Katz the United States Supreme Court considered whether the governmental use of electronic equipment to overhear and record telephone conversations in a public telephone booth constituted a search and seizure. In rejecting traditional notions of trespass and constitutionally protected areas, the Court stated that "the Fourth Amendment protects people, not places," id. at 351, S. Ct. at 511, 19 L. Ed. 2d at 582, and "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Id. at 353, 88 S. Ct. at 512, 19 L. Ed. 2d at 583. The Court's determination of the threshold question of search turned on whether the governmental activities "violated the privacy upon which [Katz] justifiably relied while using the phone booth. . ." Id. at 353, 88 S. Ct. at 512, 19 L. Ed. 2d at 583. While the Katz forumulation of the scope of Fourth Amendment protections generally would

consider "a man's home ... for most purposes [as] a place where he expects privacy," nevertheless "objects, activities, or statements that he exposes to the 'plain view' of outsiders [would not be] 'protected' because no intention to keep them to himself has been exhibited." Katz v. United States, supra at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 588 (Harlan J. concurring). The appropriate question in this case thus becomes whether the defendant exhibited a reasonable expectation of privacy which was violated by unjustified governmental intrusion into that privacy. See, e.g. People v. Becker, 188 Colo. 160, 533 P.2d 494 (1975).

The evidence at the suppression hearing does not yield the slightest suggestion that the police or anyone acting under their direction prearranged the curtains for the specific purpose of creating a visual access to the interior of the motel unit. With no evidence of such governmental action, we do not

believe the resolution of the search issue should depend on such fortuities as whether the gap was caused by a defective curtain rod, the occupant's inadvertent arrangement of the curtains, or the normal hang of the curtains. See, e.g., People v. Berutko, 71 Cal. 2d 84, 453 P.2d 721, 77 Cal. Rptr. 217 (196). Here the evidence is undisputed that the observations were made by looking through a gap in the curtains from a sidewalk area used as a common entrance way to the defendant's motel unit. Under such circumstances the defendant cannot claim a reasonable expectation of privacy from the intrusive glance of a passer-by:

> "A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy in regard to observations made there. The officer who walks upon such property so used by the public does not wear a blindfold; the property owner [or occupant] must reasonably expect him to observe all that is visible. In substance the owner

> [or occupant] has invited the public and officer to look and to see. But, by the same reasoning, the officer who intrudes upon property no so open to the public enjoys no such perogatives." Lorenzana v. Superior Court of Los Angeles County, 9 Cal. 3d 626, 629, 511 P.2d 33, 35, 108 Cal. Rptr. 585, 587 (1973).

Accordingly, we hold that where a police officer, while walking on a sidewalk used as a common entrance way to a motel room, observes through a visual aperture in the window curtains the actions of the defendant occurring inside the motel unit, the observations of the officer do not constitute a "search" in the constitutional sense of that term and do not violate the Fourth Amendment to the United States Constitution or Article II, Section 7, of the Colorado Constitution.

B.

We proceed now to the questions whether there was an exigency justifying the warrantless entry into the motel unit. The doctrine

of exigent circumstances is limited to "those situations where, due to an emergency, the compelling need for immediate police action militates against the strict adherence to the warrant requirement." McCall v. People, ___ Colo. ___, ___, 623 P.2d 397, 402 (1981).

> "Exigent circumstances justifying a warrantless arrest generally have been limited to those situations involving a bona fide pursuit of a fleeing suspect, e.g. Warden v. Hayden [387 U.S. 294, 87 S.Ct. 1642, 18 L. Ed. 2d 782 (1967)]; United States v. Scott, 520 F.2d 697 (9th Cir. 1975), cert. denied, 423 U.S. 1056, 96 S.Ct. 788, 46 L.Ed. 2d 645 (1976), or the risk of immediate destruction of evidence, e.g., United States v. Santana, 427 U.S. 38, 96, S.Ct. 2406, 49 L.Ed. 2d 300 (1976); People v. Williams, ___ Colo. ___, 613 P.2d 879 (1980), or a colorable claim of emergency threatening the life of safety of another, e.g., People v. Amato, 193 Colo. 57, 562 P.2d 422 (1977). The scope of the doctrine, however, must be 'strictly circumscribed by the exigencies which justify its initiation,' Mincey v. Arizona, 437 U.S. 385, 393 S.Ct. 2408, 2413, 57 L.Ed 2d 290, 300 (1978), quoting Terry v. Ohio, 392 U.S. 4, 25-26, 88 S.Ct. 1868, 1882, 20 L.Ed. 2d 889, 908 (1968), and the burden is on the prosecution to establish that those exigencies render the

warrantless entry truly imperative. E.g., Mincey v. Arizona, supra, Coolige v. New Hampshire, 403 U.S. 433, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971) Warden v. Hayden, supra; Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948)." Id. at ___, 623 P.2d at 402.

The trial court's findings of exigent circumstances is adequately supported by the record. Agent Shilaos was being watched from the motel unit by the defendant's companion, Joseph Herrera, and Agent Shaw, who was in uniform, was readily visible from Herrera's point of observation. It was apparent to Herrera and the defendant that the police were in the immediate vicinity of their motel room. When Shilaos observed the defendant's illegal activity he was confronted with the urgent need to prevent the immediate destruction of the contraband. Time was of the essence and only an immediate entry into the motel unit could prevent the likely disposal of the contraband by the occupants. Even with instant entry, most of the contraband

had already been flushed down the toilet.

C.

We next consider whether the officers legitimately seized the paraphernalia on the makeup table in the bedroom and the particles of granular material on the carpet under and around the makeup table, as well as the powdery material around the toilet rim in the bathroom.

"The scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Chimel v. California, 395 U.S. 752, 762, 89 S.Ct. 2034, 2039-40, 23 L.Ed 2d 685, 693 (1969) quoting Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878, 20 L.Ed. 2d 889, 904 (1968). In this case the possible destruction of the very evidence seized was the basis for the initial entry into the motel unit.

Furthermore, the officers had probable cause to arrest the defendant inside the mo-

tel unit and that arrest furnished ample justification for the seizure of the granular material and the narcotics paraphernalia. It is permissible for officers to search "the area 'within [the defendant's] immediate control' -- construing that phrase to mean the area from within which he might gain possession of ... destructible evidence." Chimel v. California, supra at 763, 89 S.Ct. at 2040, 23 L.Ed. 2d at 694; see also New York v. Belton, __ U.S. ___, ___ S.Ct. ___, LLL L.Ed. 2d ___ (1981) (49 U.S.L.W. 4915, decided July 1, 1981). The small particles taken from the floor under and around the makeup table and from other areas in the unit could readily have been destroyed or lost if they were not seized on the spot. The other objects seized were connected with the crime and were within reach of the defendant and Herrera. Accordingly, the trial court did not err in denying the defendant's motion to suppress the challenged evidence.

III. The Chain of Custody

The defendant contends that the prosecution failed to establish an unbroken chain of custody for People's exhibit 10, the box containing the particles of heroin lifted from the carpeting in the motel room. The defendant's contention centers on a claimed discrepancy between Agent Shilaos' testimony that he picked up some loose particles by hand and placed them in the box and Agent Netwall's testimony that all the granules in the box adhered to the adhesive tape.

The defendant's assertion notwithstanding, it is by no means clear that loose particles, unattached to the adhesive tape, ever found their way into the box. Agent Shilaos testified that "I simply started picking up what I could with my finger and placing them in a box and we were having difficulty in doing this ... so we tried using a piece of large scotch tape or transparent tape and press[ed] that against

the carpet and pick[ed] some debris up that way ... and we just placed that in the box." But more importantly, the prosecution as proponent of the exhibit clearly established the chain of custody for the 21.6 milligrams of heroin recovered from the carpet, and the defendant presented no evidence indicative of tampering. "Where it is only speculation that there was tampering, it is proper to admit the evidence and let the jury determine its weight." People v. Smith, 182 Colo. 228, 232, 512 P.2d 269, 271 (1973); accord, People v. Fite, ___ Colo. ___, 627 P.2d 761 (1981); People v. Atencio, 193 Colo. 184, 565 P.2d 921 (1977). We conclude that the trial court properly admitted the exhibit.

IV. Agent Netwall's Redirect Examination

The defendant also challenges the trial court's ruling permitting Agent Netwall on redirect examination to testify that the 21.6 milligrams or 0.0007 ounces of heroin constituted a usable amount. The defendant

argues that such testimony was beyond the qualifications of the witness and outside the scope of proper redirect examination. We find no error in the trial court's ruling.

Without objection from the defendant the court permitted Agent Netwall to testify as an expert witness in analytical chemistry. Whether opinion testimony is within a witness' expertise generally is a matter addressed to the sound discretion of the court and no abuse of discretion has been shown here. See, e.g., People v. Jimenez, 187 Colo. 97, 528 P.2d 913 (1974); Scott v. People, 166 Colo. 432, 444 P.2d 388 (1968); Starkey v. Bryan, 166 Colo. 43, 411 P.2d 314 (1968).

The defendant during his cross-examination of this witness inferentially injected into the trial the arguable issue of insufficient proof of guilty knowledge and/or possession due to the very minute amount of heroin recovered. Under these circumstances

the trial court acted within its discretion in permitting the prosecution to question the witness about this matter "in an effort to dispeal any unfavorable innuendo" created by the witness' testimony on cross-examination. People v. Taggart, ___ Colo. ___, ___, 621 P.2d 1375, 1386 (1981). See also, e.g., People v. Pickett, 194 Colo. 178, 571 P.2d 1078 (1977); Mathis v. People, 167 Colo. 504, 448 P.2d 633 (1968); Abeyta v. People, 156 Colo. 440, 400 P.2d 431 (1965).

V. The Sequestration Order

We next consider whether the trial court erred in failing to grant a mistrial or, in the alternative, to strike the testimony of three prosecution witnesses because of their violation of the court's sequestration order.

The trial court specifically found that although Agents Shilaos and Knott violated the sequestration order by discussing prospective testimony of these witnesses. The

Court, nevertheless, imposed the sanction of disallowing any further direct examination of Knott. Matters relating to the sequestration of witnesses and violations of sequestration orders traditionally have remained within the trial court's sound discretion. E.g., Hampton v. People, 171 Colo. 153, 465 P.2d 394 (1970); Gomez v. People, 155 Colo. 507, 395 P.2d 462 (1964). We fail to perceive any abuse of discretion, or, for that matter, any prejudice to the defendant by virtue of the limited sanction imposed by the trial court.

With respect to Agent Knott's hearing a conversation between the deputy district attorney and Agent Netwall about the percentages of active ingredients in drugs, the court determined that this overhearing was inadvertent and no sanction would be appropriate. In this instance also we find no abuse of discretion.

VI. The Sufficiency of Evidence

Contrary to the defendant's contention, we find the evidence sufficient to sustain his conviction. To withstand a motion for a judgment of acquittal the prosecution has the burden of presenting evidence which, when viewed as a whole and in a light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a rasonable person that the defendant is guilty of a crime beyond a reasonable doubt. E.g., People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973). "The substantial evidence test affords the same status to circumstantial evidence as to direct evidence, and an exclusively circumstantial case need not exclude every reasonable hypothesis other than guilt to withstand a motion for a judgment of acquittal." People v. Elkhatib, ___ Colo. ___, ___, ___ P.2d ___, (1981) (S.Ct. No. 80SA247, announced July 20, 1981).

This is not a case where the prosecu-

tion's evidence consists only of the discovery of a few particles of heroin, sprinkled on a carpet anda toilet rim in the defendant's motel unit, with no additional evidence establishing his knowledge of its location and its character as a narcotic. See, e.g., People v. Theel, 180 Colo. 348, 505 P.2d 964 (1973); People v. Larson, 180 Colo. 140, 503 P.2d 343 (1972); Ramsey v. People, 179 Colo. 172, 498 P.2d 1148 (1972). Although the amount of heroin admitted at trial was miniscule, there was ample testimonial and real evidence indicating that the defendant knowingly possessed a large amount of heroin but succeeded in preventing its seizure by flushing it away. The jury was not required to confine itself solely to the residue but rather could consider all the evidence, including the testimony depiciting the defendant's "cutting" a far greater quantity of heroin, his use of paraphernalia for this purpose, his destruction of most of the

heroin moments before his arrest, and his possession of $275 in currency at the time of his arrest. When the evidence is appropriately viewed, it is sufficient to permit a reasonable person to conclude beyond a reasonable doubt that the substance in the defendant's possession was heroin, that the defendant knew the heroin was in his possession, and that he possessed the heroin for the purpose of sale with the intent to induce or aid another to unlawfully use or possess the heroin. The trial court did not err in denying the defendant's motion for a judgment of acquittal.

VII. Jury Instructions

The defendant argues that the court improperly instructed the jury that a sale "means barter, exchange, or gift, or offer therefor ...." Although he asserts that such definition violates due process of law, we find nothing in the definition which is unconstitutionally vague. It was within the

legislative perorgative to include the aforementioned categories within the statutory definition of sale in section 12-22-301 (25) C.R.S. 1973 (1978 Repl. Vol. 5). See People v. Edwards, 198 Colo. 52, 598 P.2d 126 (1979). The court's instruction merely repeated this statutory definition.

We proceed to consider the defendant's claims regarding the trial court's refusal of seven tendered jury instructions. One tendered instruction stated that "evidence of useless traces ... of narcotic substances does not constitute sufficient evidence to sustain a conviction..." Another instruction essentially repeated this same principle by stating that possession of useless traces likewise is insufficient to sustain a conviction. Although the court rejected these instructions in the form tendered, it did instruct the jury that "evidence of possession of useless traces or residues of narcotic substances, in and

of itself, does not constitute sufficient evidence to sustain a conviction ...." In view of the trial evidence from which the jury reasonably could conclude that the defendant knowingly possessed an amount of heroin far in excess of mere traces or residue, the court's instruction correctly stated the principle of law applicable to this case and the defendant's tendered instructions were properly refused. See e.g., Romero v. People, 181 Colo. 305, 509 P.2d 201 (1979).

The defendant also tendered instructions dealing with the evidentiary significance of recent past possession or use of narcotics, his mere presence on premises where narcotics are found, and his joint possession of the motel room with another. The trial court did not err in refusing these instructions. They contain statments of law which are either incorrect or inapplicable to the facts of the case. The instructions actually

given correctly outlined and defined the essential elements of the offenses submitted to the jury and included definitions of possession, knowledge and specific intent, and a clear statement of the prosecution's burden to prove guilt beyond a reasonable doubt on all essential elements of a crime.

One of the defendant's tendered instructions dealt with opinion testimony. The court properly instructed the jury on the opinion testimony of expert witnesses, Colo. J. I. (Crim.) 4:10, and the giving of the defendant's tendered instruction on this matter would have been improper.

The last tendered instruction stated that the prosecution had the burden to prove beyond a reasonable doubt the residue of heroin recovered from the motel unit was usable for consumption or sale. This instruction was misleading and therefore properly refused. The prosecution's burden was to establish that the defendant know-

ingly possessed a usable amount of heroin for sale with the specific intent required by section 12-22-322(1)(a), C.R.S. 1973 (1978 Repl. Vol. 5). In determining whether the prosectution met its burden of proof, the jury was not required to confine itself to the resideue itself, but, rather, properly could consider all the evidence in the case.

The judgment is affirmed.

CHIEF JUSTICE HODGES does not participate.

SUPREME COURT, STATE OF COLORADO

Case No. 80 SA 494

APPEAL FROM THE DISTRICT COURT, JEFFERSON COUNTY

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee,

vs.

JOSEPH RAYMOND GOMEZ, Defendant-Appellant

Upon consideration of the Petition for Rehearing filed by the Defendant-Appellant in the above cause, and now being sufficiently adivsed in the premises,

It Is This Day Ordered that said Petition be, and the same hereby is, Denied.

BY THE COURT, EN BANC, AUGUST 31, 1981

cc: Eugene Deikman
702 United Bank Center
Denver, CO 80290

Susan P. Mele-Sernovitz
Assistant Attorney General

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF COLORADO

NO. 80SA494

THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee, vs. JOSEPH RAYMOND GOMEZ, Defendant-Appellant)	)	September 2, 1981

MOTION FOR STAY OF MANDATE

FROM THE DECISION OF THE DISTRICT COURT

OF THE

COUNTY OF JEFFERSON

Honorable Daniel P. Shannon, Judge

The Appellant, by and through his attorney, Eugene Deikman, P.C., moves this Honorable Court to stay the mandate in the above-entitled action and not permit same to be issued out of said cause until the further Order of the Court, for the reason that Appellant expects and intends, in good faith, within the time allowed by law, to

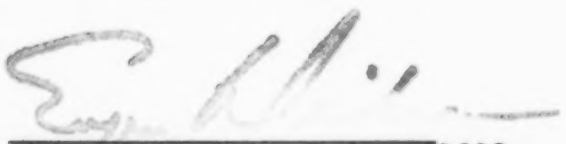
APPRENDIX C

apply to the Supreme Court of the United States by Petition for a review on Writ of Certariori of the decision, judgment and IV Amendment issues rendered in favor of Appellee and against Appellant, in the above-entitled action, and;

Appellant further moves to the Court that his bond be continued in this cause.

WHEREFORE, Appellant prays that the Court make and enter an appropriate order staying the issuance of the mandate in the above-entitled action until further Order of the Court, and that the Court continue Appellant's bond.

Respectfully submitted,



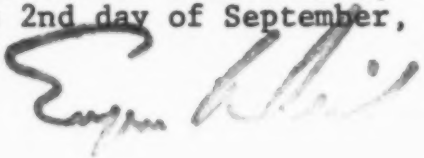
EUGENE DEIKMAN, P.C., #3608
Attorney for Defendant-Appellant
702 United Bank Center
Denver, Colorado 80290
(303) 861-4310

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the within Motion for Stay of Mandate from the Decision of the District Court of the County of Jefferson to:

J. D. MacFarlane
Attorney General
State of Colorado
1525 Sherman Street
Denver, Colorado 80203

by placing same in the United States mail, postage prepaid, this 2nd day of September, 1981.



IN THE SUPREME COURT OF THE

STATE OF COLORADO

NO. 80SA494

THE PEOPLE OF THE STATE OF COLORADO,	)	Appeal from the District Court of
Plaintiff-Appellee,	)	the County of Jefferson, State
vs.	)	of Colorado.
JOSEPH RAYMOND GOMEZ,	)	No 78 CR 0069 (Div. 5 in Trial Court)
Defendant-Appellant)		Daniel P. Shannon,

PETITION FOR REHEARING

EN BANC JUDGMENT AFFIRMED

J. D. MacFarlane, Attorney General
Richard F. Hennessey, Deputy Attorney General
Mary J. Mullarkey, Solicitor General
Susan P. Mele-Sernovitz, Assistant Attorney General

Denver, Colorado
Attorneys for Plaintiff-Appelee

Eugene Deikman

Denver, Colorado
Attorney for Defendant-Appellant

JUSTICE QUINN delivered the opinion of the Court.

CHIEF JUSTICE HODGES does not participate.

APPRENIDX D

IN THE SUPREME COURT OF THE

STATE OF COLORADO

NO. 80SA494

THE PEOPLE OF THE STATE OF COLORADO,	)	Appeal from the District Court of
Plaintiff-Appellee,	)	the County of Jefferson, State
vs.	)	of Colorado
JOSEPH RAYMOND GOMEZ,	)	No. 78CR0069 (Div. 5 in Trial Court)
Defendant-Appellant)		Daniel P. Shannon, Judge

PETITION FOR REHEARING

Defendant-Appellant, by and through his attorney, Eugene Deikman, P.C., petitions for rehearing, and as grounds, avers:

1. In its opinion of August 10, 1981, this Court failed to adequately consider the overriding constitutional limits the decision in Chimel v. California, 395 U.S. 752 (1969), imposed on the scope of a search and seizure by law enforcement officials as applied to the uncontroverted facts. Police are permitted, under Chimel, to search no farther than an area into which the defendant might reach to grab a weapon or destroy evi-

dence. If the police desire to search any other area at the time of the arrest or thereafter, they must obtain a search warrant.

It is uncontroverted that the defendant Gomez was handcuffed and under physical control within seconds after police entry into his motel room, and that consequently, any evidence alleged of "granular material" within said premises could no longer be destroyed by the suspects. It is permissable to search the area within the defendant's immediate control, the area from which he might gain possession of destructible evidence. There was no evidence he was even aware of the minute traces of granular material in the carpet, much less able to fall to his hands and knees to retrieve it with a scotch tape.

Accordingly, proper procedure under Chimel would have been to secure the motel room, obtain a valid search warrant, and then conduct an exhaustive search of the premises. There is no justification for the

assertion that minute particles not immediately seized could have been lost or destroyed, unless seized on the spot. The 7/10,000ths of an ounce trace of heroin actually seized constituted a microscopic "trace" which the suspects could not possibly have detected or destroyed. Search under those circumstnces without a search warrant was improper under the 4th Amendment to the United States Constitution, interpreted through Chimel. The warrantless seizure of evidence not within plain view of either the suspects or police officers, and plainly not within the reach of the suspects, is violative of the constitutional protections afforded by Chimel.

The significance of this issue to the Appellant arises from the fact that this trace, obtained by a warrantless search, was the only substance identified as heroin in the case.

2. The Supreme Court failed to consider

the "preturnatural inquisitiveness" (United States v. Kim, DC Haw, 415 F.Supp. 1252 (1976)) of Officer Shilaos, who, he would have us believe, managed to observe the astonishing cornucopia of detail while striding past a 1.5 inch gap in the curtained front window of Defendant's motel room. The officer's activity was preceded by a stake-out for over an hour for drugs of the premises; only in this light is the wealth of observation from this apeture credible. It is inconceivable that a police officer can intrude so far into the Defendant's motel room as to be able to describe with such wondrous particularity the contents thereof, including a quantity of brown and white particulate material, (all allegedly observable through a 1.5 inch curtain gap glimpsed through by Officer Shilaos while striding past the window) and still not be considered to have engaged in a search. The preturnatural

inquisitiveness of this officer would require, seemingly, that those members of the public desiring to manifest a reasonable expectation of privacy, would have to hermetically seal themselves from light and air to insure complete safety from such inquisitiveness.

In Lorenzana v. Superior Court, 9 Cal. 3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973), the California Supreme Court applied the Katz analysis to facts where, from five or six inches away, the officer had looked into a home through a two-inch gap between a windowshade and the sill. The Court held the search unconstitutional, stating:

> "The fact that apertures existed in the window, so that an unlawfully intruding individual so motivated could spy into the residence, does not dispel the reasonableness of the occupants' expectation of privacy. (Citations) To the contrary, the facts of this case demonstrate that by drawing the window shade Petitioner Lorenzana exhibited a reasonable expectation to be free from surveillance conducted from a vantage point in the surrounding property

> not open to public or common use. Surely our state and federal Constitutions and the cases interpreting from them foreclose a regression into an Orwellian society in which a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, airproof box. The shadow of 1984 has fortunately not yet fallen on us." (Id., 636-637.)

The defendant does not believe the United States constitution so limits the scope of 4th Amendment protection. U.S. v. Taborda, 491 F. Supp. 50 (1980), State v. Ward, 617 P.2d 568 (1980), Lorenzana v. Superior Court, supra.

3. This Court failed to adequately discuss Defendant's proferred instructions. The Defendant is entitled to a fair statement of the law in his instructions. The Court summarily dismissed the merits of Defendant's proferred instructions, without discussion or scrutiny. If the opinion had considered the contents of said instructions, it would have demonstrated that, far from containing statements of the law which are incorrect

or inapplicable to this case, they contain verbatim renditions of the Court's own language in previous apposite cases, including Macias v. People, 174 Colo. 437, 484 P.2d 782 (1971); People v. Theel, 180 Colo. 348, 505 P.2d 964 (1973); Martinez v. People, 179 Colo. 197, 499 P.2d 611 (1972).

4. The Court in its opinion entirely failed to consider the impropriety of Agent Netwall's testimony purporting to establish the definition of "useable amounts" of the narcotic codeine. As the Court is well aware, this is a case which concerns the alleged possession of heroin. It was an abuse of discretion for the trial court to have allowed, over defense objection, testimony purporting to define what amounts constitute "useable traces" of codeine. Absent a link between codeine and heroin, testimony purporting to establish useable trace limits for baby-powder and brown sugar would have been similarly appropriate. As a point of law,

this Court should have considered whether such testimony as Agent Netwall proferred and the trial court admitted tainted the criminal proceedings, violated the provisions of the Colorado Rules of Evidence, 103(d), thus depriving the defendant of his constitutional right to a fair trial Payton v. U.S., 222 F.2d 794, (4th Cir., 1955); Colorado Rules of Evidence, 103(d).

The prejudice to Appelant from this egregious departure from the rules of evidence is adumbrated by the fact that once the .0007 of an ounce of heroin was admitted into evidence, the only remaining argument of the Appellant was that it was a useless trace.

Respectfully submitted,

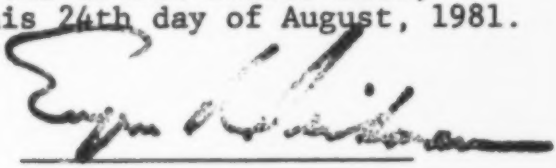
EUGENE DEIKMAN, P.C., #3608
Attorney for Defendant-Appellant
702 United Bank Center
Denver, Colorado 80290
(303) 861-4310

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the within Petition for Rehearing to:

J.D. MacFarlane
Attorney General
State of Colorado
1525 Sherman St.
Denver, Colo. 80203

by placing same in the United States mail, postage prepaid, this 24th day of August, 1981.



SUPREME COURT, STATE OF COLORADO

Case No. 80 SA 494

APPEAL FROM THE DISTRICT COURT,
JEFFERSON COUNTY, NO. 78CR0069

ORDER OF COURT

THE PEOPLE OF THE STATE
OF COLORADO, Plaintiff-Appellee,

vs.

JOSEPH RAYMOND GOMEZ,

Defendant-Appellant.

Upon consideration of the Motion for Stay of Mandate filed by counsel for Defendant-Appellant herein, and now being sufficiently advised in the premises,

It is This Day Ordered that said Motion shall be, and the same hereby is, Granted, and the Mandate of the Jefferson County District Court in case Number 78CR0069 is stayed until October 14, 1981.

APPENDIX E

It is Further Ordered that all further stays are to be obtained from the United States Supreme Court.

BY THE COURT, SEPTEMBER 4, 1981

cc: Eugene Deikman
702 United Bank Center
Denver, CO 80290

Susan P. Mele
Assistant Attorney General

Clerk of the District Court
Jefferson County Hall of Justice
1701 Arapahoe
Golden, CO 80419